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SUPREME COURT OF THE UNITED STATES

No. 200

DEPARTMENT OF REVENUE, Petitioner,

JAMES B. NEAM DISTILLING COMPANY, Respondent.

**Brief of Respondent in Opposition to Petition
for Writ of Certiorari to the Court
of Appeals of Kentucky.**

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IN THE
Supreme Court of the United States
No. 389

DEPARTMENT OF REVENUE, - - - *Petitioner,*

v.

JAMES B. BEAM DISTILLING COMPANY, - *Respondent.*

**Brief of Respondent in Opposition to Petition
for Writ of Certiorari to the Court
of Appeals of Kentucky.**

QUESTION PRESENTED.

Respondent is not satisfied with Petitioner's statement of the question presented.

Simply stated, the sole question presented is whether, on the facts of this case, the following section of the Kentucky Revised Statutes contravenes the import-export clause (Article I, Sec. 10 CL 2) of the U. S. Constitution:

K.R.S. 243.680(2):

“(a) No person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state

without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.

“(b) No railroad company or express company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of the permit, showing that payment of required taxes has been made, accompanies the shipment .

“(c) The permit shall be in the form prescribed by the department, and all shipments into the state shall be governed by the regulations promulgated by the department.”

It is Respondent's contention, sustained by the Kentucky Court of Appeals, that the foregoing section of the Kentucky Revised Statutes contravenes Article I, Sec. 10 Cl. 2 of the U. S. Constitution as applied to imported liquors in the possession of the importer and still in original packages, prior to sale.

STATEMENT.

Counsel for Respondent is authorized by Counsel for Petitioner to state that the facts in the case *are not* in dispute. This is by way of correcting the error in the phrase in the Petition for Certiorari appearing at the beginning of the second literal paragraph at the top of page 5, and reading: “The facts under dispute may be found etc.” Subsequent paragraphs, however, make it clear that the facts are not in dispute.

**REASONS WHY THIS CAUSE SHOULD NOT BE
REVIEWED BY THIS COURT.**

1. In this case the Kentucky Court of Appeals, in a unanimous opinion written by Chief Justice Stewart, has held against the Petitioner and denied its petition for a rehearing (367 S. W. 2d 267, May 24, 1963).

2. The United States Supreme Court in the case of *Low v. Austin*, 13 Wall. 29, decided the precise question at issue in 1871, the decision being in accord with that of the Kentucky Court.

3. The *Low* case (*supra*) was, of course, decided long before the passage of the Twenty-First Amendment (1933), but the passage of that amendment has not had the effect of repealing pro tanto the import-export clause of the U. S. Constitution.

On this subject we find the following general statement of the law in 30 American Jurisprudence 554-555:

“While as a general rule the regulation of interstate and foreign commerce is a matter exclusively of federal regulation, the federal government has, by the Twenty-First Amendment, yielded some of its powers with reference to intoxicating liquors. The Twenty-First Amendment circumscribes the power of Congress by prohibiting the transportation or importation of intoxicating liquors into any state or territory for delivery or use in violation of the local law, but it does not deprive Congress of authority to control the importation of liquors into the United States. Moreover, Congress possesses the power to levy import duties on intoxicating liquors imported in foreign trade or commerce, and the several states,

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without the consent of Congress, are forbidden to lay duties on imports other than such as may be necessary for executing their inspection laws."

The foregoing rule has been applied uniformly by the highest courts of California, Wisconsin and Kentucky and, very recently, by a three Judge Federal Court in the Southern District of New York,

The California cases were *Parrot v. San Francisco*, 280 Pac. 2d 881, and *National Distillers Products Corp. v. San Francisco*, 297 Pac. 2d 61. *In the latter case certiorari was denied* (352 U. S. 928, 1 L. Ed. 2d 163).

The Wisconsin case was *State Board of Review v. Milwaukee*, 15 Wis. 2d 330, 112 N. W. 2d 914 (Jan. 9, 1962)

The U. S. three Judge District Court case was *Idlewild Bon-Voyage Liquor Corp. v. Martin C. Epstein, et al.* (December 27, 1962), 212 Fed. Supp. 376.*

The Kentucky case is the case at bar.

When this case was before the Kentucky court, Petitioner placed its sole reliance on the case of *Carter v. Virginia*, 321 U. S. 131, 88 L. Ed. 605.

The Kentucky court disposed of Petitioner's contention as follows:

"The case of *Carter v. Virginia*, 321 U. S. 131, 88 L. Ed. 605, relied upon by appellee to sustain its right to levy the tax under consideration simply does not, in our view, uphold any such right or imply in any wise that the import-export clause of

*This case dealt with exports under the Import-Export clause but the reasoning applies with equal force to imports.

the Constitution of the United States may be ignored where the taxation of direct imports of foreign origin is involved."

The U. S. Judges in the Idlewild case (*supra*) dealt similarly with the Carter case and the Gordon case now relied on by Petitioner, finding that these cases had no application to the legal question at issue.

CONCLUSION.

For the reasons stated above, certiorari should be denied.

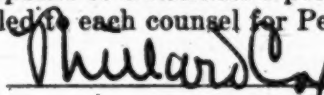
Respectfully submitted,

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Counsel for Respondent.

I hereby certify that on this 27th day of August, 1963, a copy of this Brief in response to Petitioner's petition for writ of certiorari was mailed to each counsel for Petitioner.



Millard Cox